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IN THE

Supreme Court of the United States

No. [redacted] 14

OCTOBER TERM, 1928

ALEXANDER F. WINTERS, AND
BASIL R. CRAMPTON, PETITIONERS

vs.

DENT HARDWARE COMPANY,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANK E. LIVERANCE, JR.,
Grand Rapids, Michigan,
JOHN BOYLE, JR.,
Washington, D. C.,
Counsel for Petitioners.

TRI-ART PRINTING CO., GRAND RAPIDS, MICH.

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RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

The petition of Alexander F. Winters and Basil R. Crampton respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

The matter involved in this case is that of infringement of claims numbered 1, 2, 3, 4 and 7 of a certain patent issued to the petitioners having No. 1,385,102 granted July 19, 1921 for Latch. (R. p. 104 et seq.)

The Court of Appeals for the Third Circuit has found these claims valid but not infringed by the structure of latch manufactured by the respondent. The opinion of the Third Circuit Court of Appeals has not as yet been

published in any report but is in the Record, page 208. It was handed down October 4, 1928; rehearing denied October 31, 1928.

The Court of Appeals for the Seventh Circuit has not only found these claims numbered 1, 2, 3, 4 and 7 of the aforesaid patent valid, but has also found the same to be infringed in the case of Winters, et al., vs. Sanitary Refrigerator Company, reported in 24 Fed. (2d) 15.

The latch structure used by the Sanitary Refrigerator Company was purchased from the Dent Hardware Company, respondent herein, so that the charged infringing structures in both cases, that before the Third Circuit Court of Appeals and that before the Seventh Circuit Court of Appeals are identical. The patent charged infringed is the same.

There is, therefore, a conflict in opinion with respect to the matter of infringement of claims 1, 2, 3, 4 and 7 of United States Patent 1,385,102 in the Court of Appeals for the Third Circuit and in the Court of Appeals for the Seventh Circuit upon identical structures before said courts.

The Supreme Court of the United States on October 15, 1928, granted a Petition for Certiorari to the Circuit Court of Appeals for the Seventh Circuit in the case of Sanitary Refrigerator Company vs. Winters, et al., supra.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The conflict of opinion upon the same subject matter throughout which exists between the Circuit Court of Appeals for the Seventh Circuit and the Circuit Court

of Appeals for the Third Circuit requires a determination and settlement of the conflict by this Honorable Court, as otherwise the construction of latch involved in this suit manufactured by the Dent Hardware Company can be freely manufactured and sold in the States of New Jersey, Delaware and Pennsylvania and be prohibited from manufacture, use or sale in the States of Wisconsin, Illinois and Indiana; and whether or not said structure of latch manufactured by the Dent Hardware Company can be manufactured, used or sold in the remaining territory of the United States will be undetermined and likely result in extensive litigation.

2. The decision and opinion of the Court of Appeals for the Third Circuit was handed down nearly five months after the publication in the Federal Reporter of the findings of the Court of Appeals for the Seventh Circuit upon the same state of facts. The judgment of the Circuit Court of Appeals for the Seventh Circuit finally and conclusively determined the questions of validity and infringement of claims 1, 2, 3, 4 and 7 of petitioners' patent No. 1,385,102. While the appeal of the Sanitary Refrigerator Company to the Circuit Court of Appeals for the Seventh Circuit was an interlocutory appeal, the judgment of the Circuit Court of Appeals for the Seventh Circuit was final and conclusive and was res judicata with respect to the same questions between the same parties or their privies before the Court of Appeals for the Third Circuit; involving the same claims of the same patent, the same charged infringing structure and involving the same parties, inasmuch as the defense for the Sanitary Refrigerator Company in the case before the Seventh Circuit Court of Appeals was

assumed by the Dent Hardware Company, who hired counsel, paid the bills and costs of litigation and directed completely the defense of the suit brought by petitioners against the Sanitary Refrigerator Company (Rec. p. 20.)

3. The Court of Appeals for the Third Circuit, therefore, erred in the following particulars:

1. The opinion is erroneous in holding that claims 1, 2, 3, 4 and 7 of the Winters and Crampton patent, (Rec. p. 104 et seq.) are not infringed by the device of latch structure manufactured and sold by the Dent Hardware Company made in substantial accordance with the disclosure of the Schrader patent, 1,575,647, (Rec. p. 146 et seq.)

2. The opinion is erroneous in finding that the differences in structure between the latch illustrated, described and claimed in the Winters and Crampton patent and in the latch structure manufactured by the Dent Hardware Company in substantial accordance with said Schrader patent aforesaid, affect a different principle of operation, and that the earlier patents in the latch art require a construction of said claims 1, 2, 3, 4 and 7 of the Winters and Crampton patent such that the Dent Hardware Company does not infringe.

3. The opinion is erroneous in not finding that such differences in construction as appear are differences in form only without change of function, operation or modus operandi and involve merely a reversal in parts of the kind which, in the sense of the patent law, does not change in the least the identity

which the respondent's latch structure has with the patent in suit. And, therefore, the court erred in not finding infringement even under the most restricted and limited construction which the claims of the patent in suit could have where the identity in the sense of the patent law is complete and absolute.

4. The court erred in not finding that the questions of validity and infringement had been finally and conclusively determined, as between the parties, by the Court of Appeals for the Seventh Circuit involving the same patent, the same charged infringing structure and the same parties in the sense that the Dent Hardware Company was privy to the Sanitary Refrigerator Company and is concluded by the final and conclusive judgment rendered against the Sanitary Refrigerator Company by the Seventh Circuit Court of Appeals upon the questions of validity and infringement, of which judgment of the Seventh Circuit Court of Appeals the Circuit Court of Appeals for the Third Circuit had knowledge, and which it directly referred to in its opinion.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3727, October Term, 1927, ALEXANDER F. WIN-

TERS and BASIL R. CRAMPTON, Appellants vs. DENT HARDWARE COMPANY, Appellee, and that the said judgment of the Court of Appeals for the Third Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as this Honorable Court may seem meet and just; and your petitioners will ever pray.

ALEXANDER F. WINTERS AND
BASIL R. CRAMPTON.

By Frank E. Liverance, Jr.,

John Boyle, Jr.,

Counsel for Petitioners.

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Union Paper Bag Mac. Co., et al. vs. Merrick Murphy et al., 97 U. S. 120; 24 L. Ed. 935 5

Walker vs. Giles et al., 218 Fed. 637 5

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Walker on Patents, 5th Ed. Sec. 328, P. 432 5–11

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I.

THE OPINIONS OF THE COURTS BELOW

The opinion in the Circuit Court of Appeals for the Third Circuit has not been reported. It was handed down October 4, 1928 and is printed in the record, (R.208).

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 24 Fed. (2d) 15.

II.

JURISDICTION

1. The date of the judgment to be reviewed is October 4, 1928, (R. 208). Rehearing denied October 31, 1928, (R. ~~227~~ 231).

2. In the Circuit Court of Appeals for the Third Circuit the claims of patent 1,385,102, numbered 1, 2, 3, 4 and 7, while found valid where held not to be infringed by the structure of latch manufactured by the Dent Hardware Company.

In the Circuit Court of Appeals for the Seventh Circuit the same claims of the same patent were not only held valid but were held infringed by the structure used by the Sanitary Refrigerator Company, which bought the latches from the Dent Hardware Company. The same construction of latch charged infringed was before both of the Circuit Courts of Appeals and the patent passed upon was the same before both courts.

The opinion and judgment of the Seventh Circuit Court of Appeals finally and conclusively determining the questions of validity and infringment were handed down and entered March 6, 1928 (24 Fed. (2d) 15). The Third Circuit Court of Appeals was informed of this fact, knew of it and recognized the same in its written opinion.

The defending parties in the two suits before the Circuit Court of Appeals for the Seventh Circuit and the Circuit Court of Appeals for the Third Circuit were in privity, the Dent Hardware Company assuming the defense for the Sanitary Refrigerator Company in the suit brought against it, hiring the counsel, paying the bills, directing the furtherance of the appeal to the Court of Appeals for the Seventh Circuit and standing in the place of the Sanitary Refrigerator Company, (R.20). These facts were known to the plaintiffs.

3. The jurisdiction of the Supreme Court in the present cause is invoked under section 347, Chapter 9, Title 28 United States Code, (Judicial Code, Section 240, Amended) as follows:

> "(a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any parties thereto, whether Government or litigant, to require by certiorari, either before or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

4. Rule 35 of the Rules of the Supreme Court of the United States, paragraph 5, is believed to not only sustain the jurisdiction of the Supreme Court, but to indicate circumstances under which a writ of certiorari will be granted as in a case like the present one. Said paragraph 5, insofar as it pertains to the present case, is as follows:

> "5. The review of writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *
>
> b. Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; * * *"

III.

STATEMENT OF THE CASE

A summary statement of the facts of the case and of the matters involved, a reference to the conflicting opinions of the Third and Seventh Circuit Courts of Appeals, the identity of the matters before the two Circuit Courts of Appeals, and the fact that the Supreme Court has already granted a petition for certiorari to the Seventh Circuit Court of Appeals in the case with which the opinion and judgment of the Third Circuit Court of Appeals conflicts, are set forth in the petition for certiorari, and repetition thereof is not here thought necessary or desirable.

IV.

SPECIFICATION OF ERRORS

The specification of the errors is also set forth in paragraph 3 under the heading "Reasons Relied On For The Allowance of the Writ" in the petition, and for the sake of brevity is not repeated at this point.

V.

ARGUMENT
SUMMARY OF ARGUMENT

Point A. There is complete and absolute identity of the latch structure disclosed in patent 1,385,102 in suit with the latch structure manufactured by the respondent herein in the sense of the patent law. Such changes as appear being merely changes involving reversal or transposition of two parts or elements of a combination,

all of the rest being physically identical, without change in function or principle of operation, there is identity under the patent law.

Union Paper Bag Mac. Co., et al, vs. Merrick Murphy, et al., 97 U. S. 120; 24 L. Ed. 935.
Hoyt vs. Horn, 145 U. S., 302; 36 L. Ed. 713; 12 Sup. Ct. 922.
Delvin, et al, vs. Paynter, et al, 64 Fed. 398.
Anchor Cap & Closure Corp., vs. Prichard, 232 Fed. 156.
Crown Cork & Seal Co., vs. Aluminum Stopper Co., 108 Fed. 845.
Walker on Patents, 5th Ed., Sec. 348, Page 432.
Columbia Wire Co., vs. Kokomo Steel & Wire Co., 143 Fed. 116.
Walker vs. Giles, et al., 218 Fed. 637.
Simplex Window Co., vs. Hauser Reversible Window Co., 248 Fed. 919.
Telescope Cot & Bed Co., vs. Gold Medal Camp Furniture Mfg. Co. 229 Fed., 1002.
Pittsburgh Water Heater Co., vs. Beler Water Heater Co., 228 Fed. 674.

Point B. The improvement in latches, defined in claims 1, 2, 3, 4 and 7 of patent 1,385,102, is meritorious as evidenced by its immediate acceptance, large sales and substantial supplanting and superseding of other springless pivoted lever refrigerator latches. It was an important and meritorious improvement in the refrigerator latch art. Whether a pioneer or an improvement patent, a meritorious patent is entitled to liberal treatment and to the application of the rule, "ut res magis valeat quam pereat."

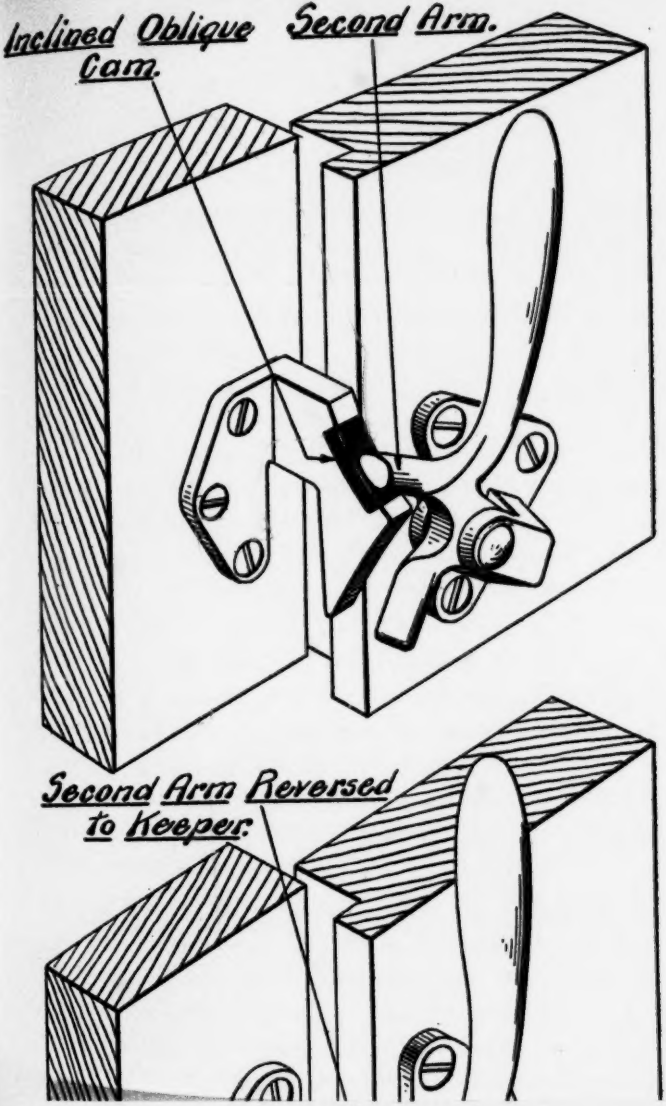
Eibel Process Co. vs. Minnesota & Ontario Paper Co., 261 U. S. 45; 43 Sup. Ct. 322.

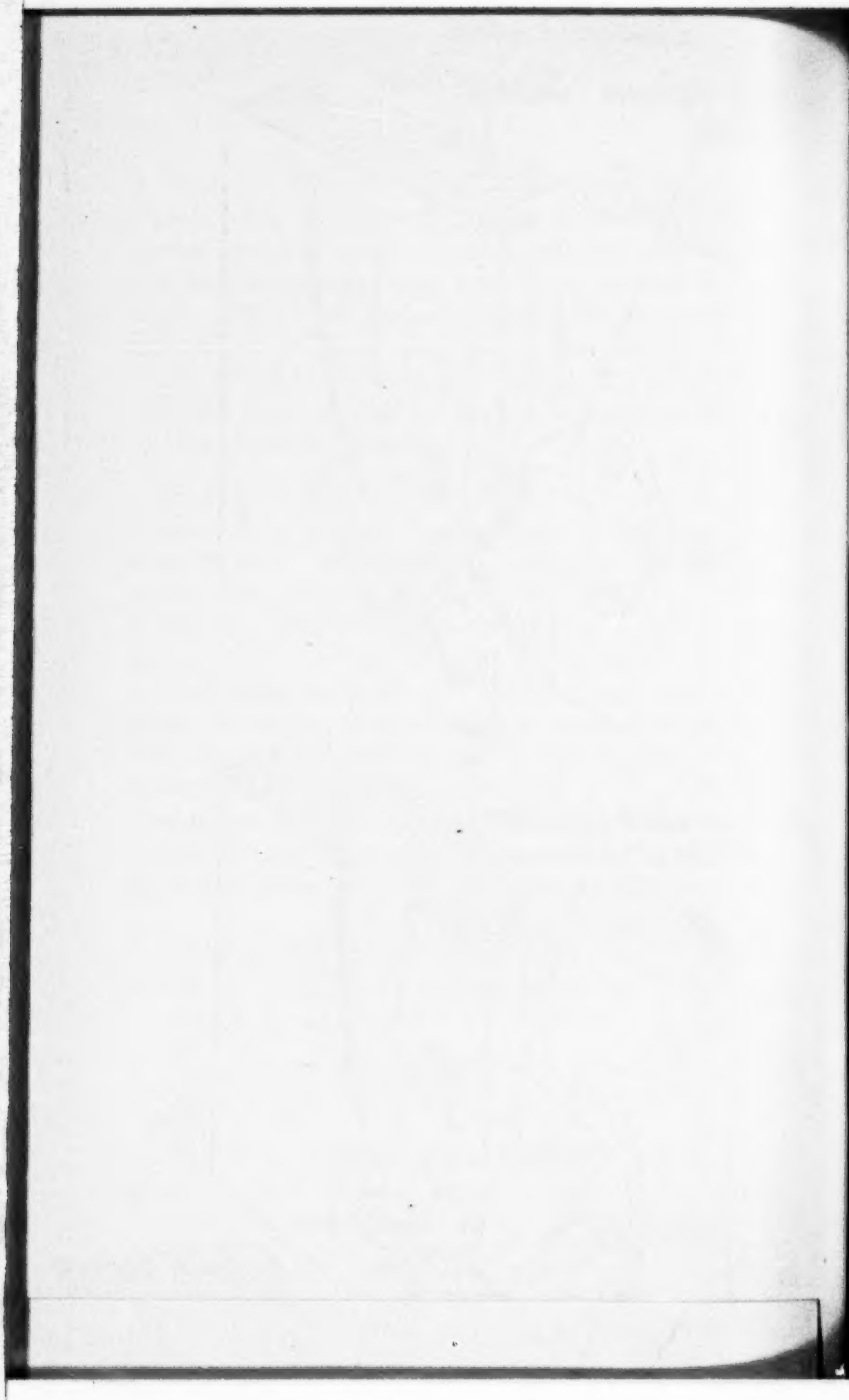
Point C. The prior patents and earlier structures considered by the Court of Appeals for the Third Circuit do not have the inventions of the patent in suit and do not necessitate any such destructive construction of claims 1, 2, 3, 4 and 7 of said patent 1,385,102 as held by the Circuit Court of Appeals for the Third Circuit, where all of said claims have been held valid, are of different scope and are not limited by reason of failure to claim the invention.

Point D. The failure of the Third Circuit Court of Appeals to give effect to the prior decision and judgment of the Seventh Circuit Court of Appeals constitutes error where there is requisite identity of the subject matter and privity between the parties as here established. The prior judgment of the Seventh Circuit of Appeals upon the question of validity and infringement, which questions were the same in both suits, is final and conclusive, notwithstanding the appeal to the Seventh Circuit Court of Appeals was interlocutory and the judgment which finally and conclusively determined the questions of validity and infringement also referred the matter back to the District Court for an accounting.

Hart Steel Co., et al., vs. Railroad Supply Co., 24 U. S., 294; 61 L. Ed. 1148.
Brady vs. Daly, et al., 175 U. S. 148; 44 L. Ed. 109.
Smith vs. Vulcan Iron Wks., 165 U. S. 524; 41 L. Ed. 810.
Southern Pacific Railroad Company, et al., vs. U. S. 168, 1; 42 L. Ed. 355.
Last Chance Mining Co., et al., vs. Tyler Mining Co., 157 U. S. 683; 39 L. Ed. 859.
Bissell Carpet Sweeper Co., vs. Goshen Sweeper Co., 72 Fed. 545.

Plaintiffs' Latch.





POINT A

IDENTITY

The Winters and Crampton patent No. 1,385,102 is in the Record (page 104, et seq.). The infringing latch structure manufactured by the Dent Hardware Company is made in substantial accordance with a subsequent Schrader patent No. 1,575,647 (R. 146 et seq.). The actual latch manufactured by the Dent Hardware Company is slightly different in design from the latch illustrated in the Schrader patent, the oblique arcuate lever c^1 being straight rather than arc shaped in form, while the head of the keeper, shown in Fig. 3 of the Schrader patent, in design very closely approximates the head 17 of the Winters and Crampton patent in suit, as shown in Figs. 2, 5 and 7 (R. 104, 106).

In order that the construction of the latch of petitioners' patent in suit and the latch as manufactured by the respondent herein may be compared, the latches have been illustrated in the accompanying cut under the heading Plaintiffs' Latch and Defendant's Latch, the first being the latch of the patent and the other the Dent Hardware Company latch.

Constructively, these latches have physical identity in many respects. The latch structures attached to the swinging doors of refrigerators, each have a fixture permanently secured to the door, including a base, an outwardly extending post and a lateral arm at the outer end of the post which is spaced from and parallel to the base of the fixture. A latch lever is used in both instances located between the base and the overhanging arm and is pivotally mounted on the fixture at a point

between its ends. At one side of the pivot, the lever is formed into an operating handle and at the other side it is an arm, hereafter called the *first* arm, or *keeper engaging* arm. The lever in both latches freely swings in a plane parallel to the face of the door, because of such mounting, through an arc of substantially 90° from a horizontal to vertical position and vice versa. The outwardly extending post of the fixture noted in both cases stops the lever when it reaches horizontal position by reason of interposing the upper side of the post in the path of movement of the handle side of the lever; and stops the lever in vertical position by reason of the interposition of the lower side of said post in the path of the movement of the keeper engaging arm.

The latch of the patent in suit has a *second* arm projecting laterally from the handle side of the lever toward the keeper. The latch manufactured by Dent Hardware Company has an inclined oblique cam projected laterally in the same direction from the same handle side of the lever.

The keeper structures attached to the door jambs of refrigerators have physical identity in the base immediately secured to the door jamb, the outstanding post projecting from the base and the depending hook head, in the lower cam edge at the outer side of the head, the inclined rear edge at the back of the depending hook and the recess into which the first or keeper engaging arm of the lever in both latches engages when the door is latched in closed position.

The keeper construction of the patent in suit has an inclined oblique cam indicated at 18 (R. 106) and indi-

cated in solid black in the cut in this brief. The keeper structure of the Dent Hardware Company, has a laterally projecting pin at the side of the hook head, indicated at b^s, Fig. 3, of the Schrader patent (R. 146).

It is the position of petitioners herein that the Dent Hardware Company has made a physical alteration of the latch of the patent consisting only and merely in transposing or reversing the *second* arm of the lever in petitioners' patent to the head of the keeper interchanging it with the inclined oblique cam at the upper outer edge of the keeper in petitioners' latch to the handle side of the lever, without disturbing in any respect the cooperation of these parts one with the other; and that such mere reversal or transposition of parts without breaking up the combination, or the cooperative relation of the parts and without affecting in the slightest the modus operandi of the combination, is a complete and direct appropriation of the entire invention made, even to the most minute details, on the ground that, in the sense of the patent law, identity is not disturbed by such mere alteration in form which in no way changes the principle of operation, the action, the function or, in the sense of the patent law, the structure of petitioners' patent.

Mere reversal of two co-acting parts in a combination machine where such parts act after the reversal the same as they did before is identity under the law of patents.

It is believed that this contention is completely and thoroughly settled in the authorities cited in the summary with reference to this point of the argument.

The question then resolves itself down to whether or not the latch used by the respondent consists merely of a reversal of the inclined or oblique cam, at the upper outer edge of the keeper head in petitioners' patent, to the lever, and a reversal of the second arm from the lever to the keeper; or whether there was something more than this done so as to obtain the results in a different manner and in accordance with a different principle.

The cooperation of the second arm on the lever of petitioners' patent in suit and the upper outer cam edge of the keeper head takes place in opening the door and also in closing the door when the lever is in its vertical position. In opening the door the inner side of said second arm rides on the outer surface of the cam edge 18 of the keeper head, prying the door open, if for any reason it is tight or sticks, as many times happens with refrigerators, due to swelling because of moisture.

In the latch made by the Dent Hardware Company the inner side of the inclined oblique cam, which has been transferred to the lever, rides against the outer side of the lug or second arm on the keeper which has been transferred to it from the lever and the door is opened, even though it should stick, by reason of the wedging cam action between the cam on the lever and the lug or pin, or second arm, (or whatever it may be called) on the keeper in exactly the same way and with exactly the same pivotal movement imparted to the lever.

In closing the door with the latch structure of petitioners' patent with the lever in vertical position, the

inner side of the second arm strikes and rides against the upper outer edge 18 of the keeper head with an automatic turning of the lever in a clockwise direction into engagement with the keeper hook. With the latch made by the respondent the inner side of the inclined oblique cam which has been transferred from the keeper to the lever strikes and rides against the upper outer side of the second arm which has been transferred to the keeper, with a like automatic clockwise movement of the lever into engagement with the hook of the keeper.

There has now been no new combination made by this mere reversal of one stationary and one movable part which in their reversed positions cooperate in the same way by having the same relative movements with respect to each other. This is the kind of change in the relative position of the parts of a machine meant in the first sentence of the first paragraph of Section 348 of Walker on Patents, where the change in relative position in no way affects the respective functions of the parts which have been changed. It is not a change like that referred to in the second paragraph of Section 348 of Walker on Patents, where the changing has so changed the functions of the parts that the machine is a new machine with a substantially different mode of operation.

The modes of operation of the latch of the patent in suit and of the latch used by the respondent are identical in every respect. There has been no change in function and the only thing that can be said, and which was urged before the Circuit Courts of Appeals for both the Third and Seventh Circuits, namely, that the location of the inclined oblique cam on the latch used by petitioner is

closer to the pivot of the lever than is the second arm in the latch of the patent, while the lug or reversed second arm on the keeper head is located inward from the outer upper edge of said keeper head, thereby making a closer coupling of the two cooperating parts (the second arm and the inclined cam), is merely a slight change in the leverage and makes only a slight difference in degree of the force which may be secured in opening a door which sticks, though the way that the door is pried open remains exactly the same.

Most rearrangements and reorganizations of elements which make a new invention, in fact, it is believed all of such reorganizations and rearrangements which really make a new combination, are reorganizations and rearrangements which go far beyond merely reversing two cooperating parts, one of which is stationary in the device of the patent and the other of which is movable, while in the charged infringing device the stationary and movable parts have been merely reversed. Mere reversal of this kind has always been, it is submitted, considered identity in the sense of the patent law irrespective of how strict a construction is made of the claims of a patent. For the question of the breadth or scope of the patent becomes merely academic as stated on page 160, 232 Fed. of Anchor Cap & Closure Co., v. Prichard, Supra, where there has been a faithful copying of the patented mechanism except for such mere reversal; because, in fact, in such cases, in the sense of the patent law, there is absolute and complete identity which will bring the infringing article within the scope of any valid claim of the patent whatever its construction may be.

POINT B

PATENT IN SUIT MERITORIOUS AND ENTITLED TO LIBERAL TREATMENT

The latch structure of patent 1,385,102 was immediately taken by the refrigerator trade, 90% of the volume of commercial refrigerator latches was supplied by the latch of this patent (R. 18, 34), over two million had been sold at the time the testimony was taken in the suit before Judge Geiger in Milwaukee, (R. 38) as appears by the numbers listed for the different sizes in plaintiffs' exhibit 8, (R. 117) for the years 1921 to 1926 inclusive. About four hundred thousand were sold in the year 1925 and one of the inventors, Mr. Crampton, (R. 19) again stated that 90% of the commercial refrigerators bought their latches from his company.

The Condit latch was noted by the witness Crampton (R. 34) and its defects pointed out; and such Condit latch was very much in production and being extensively used when the patent in suit came on the market.

Four hundred thousand latches of the new type and of the springless automatic swinging lever type, as distinguished from the automatic spring latch, must have supplanted and superseded to a large extent the springless swinging lever latches of the Condit type before the advent of the patent in suit.

Commercial success alone is not necessarily material to the question of the inventive improvement made when a new structure comes on the market. But in an art like the refrigerator latch art, which had been worked extensively for a great many years, where there were innumerable latch structures available which had been in

practical use on refrigerators prior to 1920, it is submitted that a new latch entering such field with immediate success such that it renders obsolete other latches like the Condit, previously used, or other springless swinging lever latches of the Dent type, made in accordance with the Dent patent 670,506, (R. 120 et seq.) is evidence of a very meritorious invention and one of no low order or mean degree.

While in no sense a pioneer in the art of refrigerator latches, the latch of the patent in suit was a very meritorious construction evidenced not only by its immediate acceptance and large sale, but by the actions of the Dent Hardware Company which had the other old swinging lever latches available to use, like the Condit latch and the Dent latch aforsaid, yet left such latches and began the manufacture of the latch which is in controversy in this suit. It left the latches which were free and open for it to use to manufacture the patented latch of petitioners with the inevitable litigation which resulted from it.

Business concerns do not deliberately undertake infrigement of a patent which will result in long, vexatious and expensive litigation unless the patented article has merit over and above things in the same art which are free for it to use without trouble. All these circumstances prove clearly, it is submitted, the merit of the patented construction which the petitioners devised. While, as in the preceding point of argument, it has been shown that in the sense of the patent law the structure manufactured by the respondent herein is identical with the patent in suit and comes within the range of even

the most narrow and restricted construction which the patent can have, the improvement which petitioners made unquestionably was meritorious and under the principles of Eible Process Co., vs. Minnesota & Ontario Paper Co., Supra, it is entitled to a liberal treatment rather than any narrow restricted treatment.

POINT C

THE PATENT FULLY CLAIMS THE INVENTION AND THE PRIOR ART NECESSITATES NO DESTRUCTIVE CONSTRUCTION OF THE CLAIMS

The patent in suit, insofar as it is before the Supreme Court, has five claims, numbered 1, 2, 3, 4 and 7 (R. 178, 179) to the invention made. The claims are of varying scope, claims 1 and 2 being specific, claim 3 the broadest claim and claims 4 and 7 of an intermediate range between the broadest and most specific claims. These claims were allowed as submitted to the Patent Office without question and (R. 168) with the Keil and Dent patents, prior examples of drop handle swinging lever springless latches, before the Examiner. The Keil latch (R. 124 et seq.) is the old and well known drop handle latch pivoted at one end and operated by manually pushing the handle in at its lower end when the door is closed. The operation is fully described lines 74 to 97 R. 125. The Dent latch (R. 120 et seq.) is of a similar type pivoted drop handle latch pivoted at one end and its operation is fully set forth in lines 72 to 91 inclusive (R. 121). One other latch, that of Charles (R. 152 et seq.) is a swinging lever latch pivoted on the door jamb, not on the door, swinging across the meeting edges of the door and door jamb. It has two arms d and e succes-

sively engaged by two inclines i and h on the swinging door to automatically turn the lever to bring the handle of the latch lever into engagement with the keeper hook g. Neither of the arms d and e ever engages with the keeper hook; and it is absolutely impossible to reverse the lever c of Charles to the door and the keeper to the door jamb and make the lever turn automatically to keeper engaging position when the door is closed.

These various prior latch patents, as well as the automatic Condit latch type, as shown in the patent to Schrader, 1,114,296, (R. 128 et seq.) illustrate in various ways pivoted or swinging latch levers all on the market prior to the time of petitioners' latch, all supplanted and superseded and rendered obsolete by the advent of petitioners' latch. Irrespective of the possibility of picking various elements here and there among the several patents, none of them have the combinations defined in the various claims 1, 2, 3, 4 and 7 of petitioners' patent in suit. The combinations defined in these claims are new, not anticipated and not restricted by the prior art merely because the prior art includes springless swinging lever latches among which can be found levers, cams, arms, keepers and the like, so long as the several elements which go to make up petitioners' latch have not been organized and combined to work on the same principle to attain the same results in any prior patent.

POINT D

RES JUDICATA

The principles upon which the doctrine of res judicata is founded are well settled. The subject matter in the

suits must be the same. The parties must be the same, that is, identical, or properly related by privity. The judgment in the earlier case must be final and conclusive of the facts which are set up as res judicata in the later case. In the event that a party in the first case is not formally the party in the second case against whom res judicata is urged, such party in the second case must have been so concerned in the first case, to the knowledge of the opposing party, that the party in the second case asked to be concluded in the judgment of the first case is, in effect, the same as the party in the first case against whom the judgment was rendered.

In the present situation there is no question as to the identity of the matters involved in the two cases before the Seventh and Third Circuit Courts of Appeals. The same patent, No. 1,385,102, the same claims of the patent, Nos. 1, 2, 3, 4 and 7, and the same structure charged infringed appear in both cases without variation in any respect.

There is no question as to the privity existing between the Dent Hardware Company and Sanitary Refrigerator Company and that such privity was known to the plaintiffs, petitioners herein. It is charged in the Bill of Complaint, (R. 7). It is admitted by the Vice-President of the Dent Hardware Company that it, in effect, though not formally on the record, substituted itself for the Sanitary Refrigerator Company in the case tried in the Seventh Circuit.

The judgment that was rendered by the Seventh Circuit Court of Appeals on March 6, 1928, finally and conclusively determined the questions of validity and in-

fringement of claims 1, 2, 3, 4 and 7 of patent No. 1,385,-102, as against the Sanitary Refrigerator Company and its privy, Dent Hardware Company.

The only disputable question, it would seem, relates to the decision and judgment of the Court of Appeals for the Seventh Circuit handed down and entered on March 6, 1928. The appeal to the Court of Appeals for the Seventh Circuit was an interlocutory appeal, as the accounting had not been determined. The Court of Appeals for the Seventh Circuit, however, had to pass upon the questions of validity and infringement of the claims of the patent and it is submitted that, notwithstanding the appeal was an interlocutory one, its judgment was final and conclusive respecting the questions of validity and infringement of the patent. It is believed that this is supported by the Supreme Court case, Smith vs. Vulcan Iron Works, Supra. All of the Circuit Courts of Appeals held before the time of such case that in a patent case where an interlocutory appeal was had to consider validity and infringement questions, and not the accounting, the decision of a Court of Appeals, whether for or against the patent, is final and conclusive as to validity and infrigement and becomes the law of the case which cannot later be reconsidered either by the Court of Appeals which renders the final and conclusive judgment or any lower court. The Supreme Court in said case of Smith vs. Vulcan Iron Works referred specifically to a case of the Sixth Circuit Court of Appeals, namely, Bissell Carpet Sweeper Co. vs. Goshen Carpet Sweeper Co., Supra, wherein Judge Lurton, later a Justice of the Supreme Court, with the concurrence of Judge Taft, now Chief

Justice of the Supreme Court, and Judge Hammond, reversed an earlier decision which had held to the contrary, bringing the practice in conformity with the other Circuit Courts of Appeals; and establishing that in a case of this kind, although the appeal is interlocutory, the questions of validity and infrigement which are decided are finally and conclusively decided and not subject thereafter to reconsideration and change.

Petitioner is aware that the matter has been decided in one of the lower courts, a District Court, directly contrary to what it now urges. This decision is of a Circuit Court of the United States, Nothern District of New York, Australian Knitting Co. vs. Gormley, 138 Fed. 92, wherein Judge Ray, because the decision had been on an interlocutory appeal, held that the judgment was not final, apparently for the reason that the Supreme Court in the years before the establishment of Circuit Courts of Appeals, in order to have jurisdiction of a patent case appealed to it, had to take the case after a final decree settling *all* issues had been entered in the court below. That is, in a patent case, before 1892 any appeal to the Supreme Court could be taken only after not only the questions of validity and infringement had been settled but also the accounting.

It is contended that the decision of Judge Ray was wrong for the reason that it is not necessary that an entire case involving different things be completed and conclusively settled as to all matters contained therein in order for res judicata to apply, but it is only necessary that the particular questions with respect to which res judicata is invoked shall be finally and conclusively

settled and determined to an extent that they cannot thereafter be reopened in the court of final resort which finally and conclusively settled such questions, or in any subordinate court under such court of final resort.

It would seem that in an analogous situation, that of Brady v. Daly, Supra, involving a copyright, the Supreme Court held that a decree which established the validity of the copyright was final and res judicata, as between the parties, even though damages were to be later collected.

Finally in a comparatively recent case of the Supreme Court, Hart Steel Co. vs. Railroad Supply Company, Supra, on Page 1153 of 61 L. Ed. the Supreme Court stated that the doctrine or res judicata was not to be considered as a mere matter of practice or procedure coming down from a more technical time, but that it should be considered as a rule of fundamental and substantial justice which should be cordially regarded and enforced to the end that rights once established by a court of competent jurisdiction should be recognized by those bound by it in every way wherever the judgment is entitled to respect.

It is, therefore, contended by the petitioners herein that the judgment rendered and entered by the Court of Appeals for the Seventh Circuit, March 6, 1928, of which the Third Circuit Court of Appeals had immediate information, which it knew of and recognized and admitted in the opinion handed down by it, (R. 208 et seq.) should have been held by the Third Circuit Court of Appeals as conclusive against the Dent Hardware Company because of the final and conclusive determination

of exactly the same questions by the earlier judgment of the Court of Appeals for the Seventh Circuit. It is submitted, that this prior judgment, though coming after an interlocutory appeal, is as final and conclusive respecting the questions involved as though it was a judgment entered at the eventual determination of the case. The questions of validity and infringement were questions distinctly put in issue and directly determined by the Court of Appeals for the Seventh Circuit which had jurisdiction thereof. They were finally and conclusively determined by the Court of Appeals for the Seventh Circuit and it is submitted that these findings 'cannot be disputed in a subsequent suit between the parties or their privies, * * *." (Southern Pacific Railroad Co. vs. United States, Supra.)

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, in order that justice may be done, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Appeals for the Third Circuit and finally reverse it.

Respectfully submitted,

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